87-942

No.

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1987

DON R. SPEER,
Petitioner,

vs.

OTTAWAY NEWSPAPERS, INC.,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

I. DOES THE FIRST AMENDMENT REQUIRE OR PERMIT DISTRICT AND APPELLATE COURTS OF THE UNITED STATES TO MAKE INDEPENDENT DETERMINATIONS OF WITNESS CREDIBILITY IN ASCERTAINING THE EXISTENCE OF *NEW YORK TIMES* MALICE IN A LIBEL CASE TRIED TO A JURY?

II. DOES THE FIRST AMENDMENT SUPPLANT COMMON LAW PRINCIPLES OF RESPONDEAT SUPERIOR IN A LIBEL CASE SO THAT THE KNOWLEDGE OF FALSITY POSSESSED BY A DECEITFUL EMPLOYEE IS NOT IMPUTABLE TO HIS EMPLOYER?

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OPINIONS BELOW

The opinion of the United States District Court for the Western District of Missouri is not officially reported. It is, however, set out in Appendix B to this Petition. The Opinion of the United States Court of Appeals for the Eighth Circuit is reported in 828 F.2d 475. It is also set out in Appendix A to this Petition.

JURISDICTION

When suit was filed on May 11, 1984, Petitioner was a citizen of the State of Missouri. Respondent was a Delaware corporation having its principal place of business in a State other than Missouri. The district court's jurisdiction was based on diversity of citizenship, 28 U.S.C. §1332(a).

The judgment of the United States District Court for the Western District of Missouri was filed on August 29, 1986. Petitioner herein timely filed his notice of appeal, appealing that judgment to the United States Court of Appeals for the Eighth Circuit. On September 9, 1987, the Eighth Circuit handed down its opinion, affirming the district court's judgment. This Court's jurisdiction is bestowed by 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the First Amendment to the United States Constitution which provides as follows:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

It also involves the Seventh Amendment to the United States Constitution which provides as follows:

> In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

STATEMENT OF THE CASE

Petitioner, Don Speer, is a Joplin, Missouri police officer. Respondent, Ottaway Newspapers, Inc., is the owner of, *inter alia*, the Joplin *Globe*, a newspaper with about 40,000 subscribers.

On Saturday, April 23, 1983, 20 to 25 protestors picketed in front of Billy's Bar, located on Main Street in downtown Joplin. The protestors were demonstrating against Billy's Bar because it had a primarily homosexual clientele.

Around 7:00 that evening Petitioner was summoned to arrest the picketers because they did not have a parade permit. While Petitioner was making arrests, he was approached by Max McCoy. (Mr. McCoy was later identified as a *Globe* reporter.) Petitioner and McCoy became involved in an altercation which resulted in McCoy's arrest. The reasons for the altercation and the amount of force used in making the arrest were the subjects of controversy.

On April 24, 1983, the *Globe* published a front page story that stated McCoy's version of the altercation. Among other things the article accused Petitioner of handcuffing McCoy while he was prostrate in the middle of Main Street and then kicking him and beating him while he was defenseless. This account differed radically from what Petitioner said happened.

On April 25 one of the picketers, Hazel Bearden, called the *Globe* and asked for the "man in charge" (T.50-51). According to the *Globe's* evidence the man in charge of investigating the McCoy affair was Tom

Murray, an editor (T.632). Mrs. Bearden told the man with whom she spoke that the April 24 article was a "pack of lies" (T.51, 66-67). Mr. Murray denied ever speaking to Mrs. Bearden but said that if he had, he would have investigated the matter further (T.638-639).

On April 26, 1987, the day after Mrs. Bearden's call, an editorial appeared in the *Globe*. The editorial is reproduced in Appendix C. It stated that Petitioner participated in the following conduct: "And while [McCoy] was cuffed and defenseless, the officers continued to strike him, kick him."

The *Globe* never interviewed Petitioner or any of the witnesses identified in the report Petitioner prepared on the incident although *Globe* reporter Weickert reviewed that report the evening of April 23 (T.755). (At trial Weickert denied that the report said anything about the altercation or that it listed the names and addresses of witnesses. That testimony was directly contradicted by the report Petitioner testified he prepared the evening of April 23 [P.Ex. 27, T.214].)

Petitioner filed suit in the United States District Court for the Western District of Missouri, alleging that the aforedescribed editorial was libelous. He alleged that the editorial was published with actual malice in that McCoy, who provided the information appearing in the editorial, knew it was false. He also alleged that the editors of the *Globe* who wrote and approved publication of the editorial did so with reckless disregard for the truth.

On July 7, 1986, the case went to trial. The jury returned a verdict in favor of Petitioner for $100,000 in actual damages and $50,000 in punitive damages.

Thereafter, Respondent filed its motion for judgment notwithstanding the verdict and, alternatively, for a new trial.

The district court entered judgment notwithstanding the verdict on two grounds. First, it found that McCoy's knowledge could not be imputed to the *Globe* because he did not write the editorial. Second, it found that the editors did not publish the editorial with a reckless disregard for the truth because (according to Respondent's evidence) McCoy was a very honest employee who never lied and because two independent witnesses to the incident—neither of whom testified at trial—verified what McCoy said. The Court overruled the alternative motion for new trial.

Petitioner appealed to the United States Court of Appeals for the Eighth Circuit. On September 9, 1987, that Court affirmed the district court's judgment.

REASONS FOR GRANTING THE WRIT

I. The District Court and Court of Appeals Improperly Weighed the Credibility of Witnesses in a Libel Case.

The heart of the Court of Appeals' decision as to whether Ottaway acted with reckless disregard for the truth is as follows:

> The *Globe* in this case, however, had no reason to doubt its source, because it knew McCoy as a trusted employee and believed him to be reliable, honest, and good with details. The *Globe* also knew from McCoy's physical injuries and broken camera the arrest had been other than an ordinary, peaceful

> incident; thus, McCoy's story was not inherently improbable. Neither is actual malice suggested by the *Globe's* failure to interview Speer or any of three other citizen witnesses identified in the police report or by the *Globe's* failure to heed the phone call from a demonstrator warning McCoy's story was a "pack of lies." The *Globe* already knew both versions of the arrest, and at least two eyewitnesses had corroborated McCoy's version.

828 F.2d, at 478. Based on these findings of fact the Court of Appeals concluded that a mere failure to investigate the two versions of the incident in front of the bar does not establish malice.

The principal vice of this conclusion is its dependence on evidence wholly adduced by Respondent. The evidence that McCoy was a trusted employee and that his editors believed him to be honest came entirely from witnesses employed and called at trial by Respondent (T.607, 612). The claim that McCoy's version was corroborated by "at least two eyewitnesses"—neither of whom testified at trial—was totally dependent on the testimony of one of Respondent's editors. What if, however, the jury did not believe that editor when he said that two witnesses called him and corroborated McCoy's story? What if the jury did not believe the editors who said they had no reason to doubt McCoy?

The Court of Appeals indicated that McCoy's injuries provided an objective basis for finding that his story was not inherently implausible. McCoy testified that he weighed 190 pounds at the time of the incident and that Speer picked him up and threw him 15 feet through the air (T.560-562). He claimed that after landing he was

handcuffed and beaten up in the middle of Main Street in downtown Joplin at 7:00 p.m. on a Saturday night in front of 25 protestors, unnumbered bar patrons and spectators, not to mention the occupants of vehicles driving down Main Street at that time. A jury drawing legitimate inferences from McCoy's story could conclude that it would take a great deal more than the kind of injuries McCoy received to make this story remotely plausible.

The Court of Appeals' analysis (along with that of the district court) usurps the fact-finding function of the jury. It is a rule of universal application that in determining whether to grant a motion for judgment notwithstanding the verdict, a court is not free to weigh the evidence, or to pass on the credibility of witnesses, or to substitute its judgment of the facts for that of the jury, 9 C.A. Wright & A.R. Miller, *Federal Practice and Procedure,* §2524, at 543-544 (1971). Rather, courts are required to view the evidence in the light most favorable to the non-movant and give that party the benefit of all reasonable inferences to be derived from the evidence, *Ibid.*, at 544-545.

These rules did not arise in a vacuum; they are the logical outgrowth of the Seventh Amendment's prohibition against a court's redetermination of facts found by a jury, *Atlantic and Gulf Stevedores v. Ellerman Lines, Ltd.*, 369 U.S. 355, 359 (1962).

With commendable candor Respondent argued in the district court and the Court of Appeals that the foregoing rules do not apply in libel cases. Thus, Respondent argued (and the Court of Appeals implicitly agreed) that the evidence in a libel case is *not* viewed in the light most favorable to the plaintiff and that the court is free to

base its decision on evidence that the jury may have disbelieved. The basis for using a different manner of review in libel cases is derived from the following statement in *New York Times Co. v. Sullivan,* 376 U.S. 254, 285 (1964): "We must 'make an independent examination of the *whole record,*' [citation omitted] so as to assure ourselves that the judgment does not constitute a forbidden intrusion on the field of free expression." (Emphasis added.) In a footnote to this language the Court noted that the Seventh Amendment's ban on reexamination of facts did not preclude a review of findings of fact "where a conclusion of law as to a Federal right and a finding of fact are so intermingled as to make it necessary, in order to pass upon the Federal question, to analyze the facts." *Ibid.,* at 285 n.26.

Whatever footnote 26 means, Petitioner would respectfully submit that it does not abolish the function of the jury in determining matters of credibility. If that were the Court's intention, surely it would not have reiterated in *Anderson v. Liberty Lobby, Inc.,* 477 U.S. ....., 91 L.Ed.2d 202, 216 (1986), that: "Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge . . . ."

These jury functions are not changed by the "convincing clarity" standard a plaintiff must satisfy in a libel case. That point was well explicated by the Ninth Circuit in *Guam Federation of Teachers, Local 1581, A.F.T. v. Ysrael,* 492 F.2d 438, 441, *cert. den.,* 419 U.S. 872 (1974):

> [I]n a libel case, as in other cases, the party against whom a motion for . . . directed verdict, or a motion for a judgment notwithstanding the verdict is made

> is entitled to have the evidence viewed in the light most favorable to him and to all inferences that can properly be drawn in his favor by the trier of fact. We think, too, that in such cases it is not only not the duty of the judge, or of this court of appeals, to weigh the credibility of the evidence, or to draw inferences in favor of the moving party (except, of course, when no contrary inference can legitimately be drawn), but that neither the judge nor this court on appeal has the authority to weigh credibility or to choose among legitimate inferences in such cases.
>
> The *standard* against which the evidence must be examined is that of *New York Times* and its progeny. But the *manner* in which the evidence is to be examined in the light of that standard is the same as in all other cases in which it is claimed that a case should not go to the jury. If the evidence, so considered, measures up to the *New York Times* standard, the case is one for the jury, and it is error to grant a directed verdict . . . .

(Emphasis in original.) In the case *sub judice* the Court of Appeals committed the same error condemned in *Ysrael*: It elided the distinction between the *standard* against which evidence must be measured (i.e., convincing clarity) and the *manner* in which such evidence is to be examined (i.e., viewing the evidence in the light most favorable to plaintiff, leaving credibility determinations to the jury, etc.).

Petitioner would submit that the issues raised by the instant cause are profoundly important to achieving a balance of the rights protected by the First and Seventh Amendments. Because of the significance of the rights

secured by the former amendment, the fundamental liberties protected by the latter are sometimes overlooked.

In *Parsons v. Bedford,* 28 U.S. (3 Pet.) 443, 446 (1830), Justice Story noted that: "One of the strongest objections originally taken against the Constitution . . . was the want of an express provision securing the right of trial by jury in civil cases." The Seventh Amendment was adopted in response to this objection and "received an assent of the people so general as to establish its importance as a fundamental guarantee of the rights and liberties of the people." *Ibid.* Subsequent cases have reaffirmed that trial by jury in civil cases is a "fundamental and sacred" right which "should be jealously guarded by the courts." *Jacob v. City of New York,* 315 U.S. 752, 753 (1942). To that end this Court has held that: "Maintenance of the jury *as a fact-finding body* is of such importance . . . that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care." (Emphasis added.) *Beacon Theatres v. Westover,* 359 U.S. 500, 501 (1959).

It is difficult to conceive of a rule more corrosive of that right than having the jury's findings of fact ignored. If the Court of Appeals and Respondent are right in the case at bar, it is difficult to comprehend what useful function remains for juries to perform in libel cases.

The instant cause does not represent an anomaly among the lower courts. The opinion by the Missouri Court of Appeals in *Warner v. Kansas City Star Co.,* 726 S.W.2d 384 (Mo.App. 1987), indicates the extent to which the right to a jury trial in libel cases is in peril. In *Warner* the court formulated the issue on who determines witness credibility as follows:

> [T]he trial judge, upon defendant's motion for judgment [notwithstanding the verdict] has expressly found the issue of actual malice contrary to the jury. *To whose assessment of credibility, to whose weighing of the evidence for convincing clarity, do we defer, the judge's or the jury's?*

(Emphasis added.) 726 S.W.2d, at 390. Based on its reading of *New York Times and Bose Corporation v. Consumers Union of United States, Inc.*, 466 U.S. 485, 499-500 (1984), the court concluded that the trial court's credibility determination must prevail: "The jury after all has no advantage over the trial judge in seeing and hearing the witnesses." 726 S.W.2d, at 390.

The instant cause and *Warner* demonstrate the critical importance of granting certiorari: It is time for this Court to indicate once and for all whether it intended to abolish the right to jury trial in libel cases in *New York Times*. If that was indeed the intent behind the "independent-examination-of-the-whole-record" language, then such should be stated with clarity. If, on the other hand, the Seventh Amendment's mandate that "no fact tried by a jury, shall be otherwise reexamined by any Court of the United States" means what it says, then this Court should reaffirm its fidelity to the plain language of the Constitution. That end can only be accomplished by granting certiorari in this case.

II. The District Court and Court of Appeals' Opinion Improperly Applied Rules of Respondeat Superior in a Libel Case.

In *New York Times* this Court held that actual malice could be established by evidence that the defendant knew

the defamatory matter was false. However, in dealing with a corporate principal, the "state of mind required for actual malice would have to be brought home to . . . persons . . . having responsibility for the publication . . . ." 376 U.S., at 287. Petitioner argued in the lower courts that McCoy's knowledge of the falsity of the facts appearing in the editorial satisfied this requirement.

The Court of Appeals disagreed:

> McCoy after his arrest was taken off the story of the April 23 demonstration, and his input into the editorial was limited to several meetings with *Globe* editors during which he was treated like any other outside source. He had no input in suggesting the topic for the editorial, making recommendations regarding the editorial's content, writing or reviewing the editorial before publication, or deciding whether the editorial would be published. He also did not exercise on behalf of the *Globe* any editorial judgment through the compilation, assimilation, evaluation, or presentation in print, of fact or opinion. Photographs McCoy took at the demonstration were not used in connection with the editorial. In short, McCoy contributed to the *Globe's* publication of the editorial only to the same degree as would any other citizen who participated in, became involved in, or observed a news event and provided the *Globe* with a firsthand account. A reporter like McCoy, who is relegated solely to the role of an outside source and who has nothing to do with publication of the libelous material, is not responsible on behalf of a news organization for the ultimate publication of information given. Thus, a finding of institutional actual malice

> by the *Globe* may not be based only on McCoy's state of mind.

828 F.2d, at 477. Petitioner would respectfully submit that this statement constitutes a selective recitation of facts and ignores fundamental principles of the law of respondeat superior.

While *Respondent* did adduce testimony to support the foregoing statement, the Court of Appeals overlooks crucial admissions made by editors of the *Globe*. Gary Garton, the editor who assigned McCoy to go to the bar, told him to both photograph the demonstration and write a story about it (T.493). Respondent admitted that when McCoy covered the demonstration and took photographs of the picketers, he "was acting within the scope and course of his employment" (T.347). The *Globe* also admitted that when McCoy supplied information to its editors that was later used in the editorial, he was acting "within the scope and course of his employment" (T.347, 612). These admissions *by the Globe* flatly refute the Court of Appeals' finding that: "McCoy contributed to the *Globe's* publication of the editorial only to the same degree as would any other citizen who participated in, became involved, or observed a news event and provided the *Globe* with a firsthand account." 828 F.2d, at 477.

Moreover, the Court of Appeals simply ignores traditional rules of respondeat superior in reaching its conclusion. It is axiomatic that under the doctrine of respondeat superior an employer is liable for the torts (including libel) of his servant because the acts of the servant become the acts of the master, *Carter v. Willert Home Products, Inc.*, 714 S.W.2d 506, 511 (Mo. *en banc* 1986).

For that reason, "An agent's malice is imputable to the corporation, making the latter liable for malicious, willful, or criminal torts of its agents or employees within the scope of their employment." *State on Inf. of Taylor v. American Ins. Co.*, 355 Mo. 1053, 200 S.W.2d 1, 40 (*en banc* 1947). A corporation can be liable for its employee's wrongful act even though it did not authorize, concur in, or know of, the act, *Ibid.* It follows from these rules that knowledge which an agent acquires in the scope and course of his employment and which he has a duty to disclose to his principal will be imputed to the principal, *Restatement (Second) of Agency*, §275. The personal animus of the agent does not prevent an act from being within the scope of employment, *Ibid.*, §236, Comment "b".

These principles were not superannuated by *New York Times.* In *Cantrell v. Forest City Publishing Co.*, 419 U.S. 245, 253-254 (1974), this Court held that a reporter's knowledge of the true facts appearing in a story could be imputed to his employer if the reporter was acting within the scope of his employment when he acquired the information. This holding reversed the opinion of the Court of Appeals that exonerated the reporter's employer because there was no proof that the employer "printed and distributed the article with any knowledge of the falsities contained in it . . . ." *Cantrell v. Forest City Publishing Co.*, 484 F.2d 150, 157 (6th Cir. 1973).

There is no question that McCoy acquired the information about what happened in front of the bar while he acted in the scope and course of his employment. There is no question that he communicated that information to the editors of the *Globe* in the scope and course

of his employment. Under the foregoing rules, McCoy's acts and knowledge must be imputed to the *Globe*.

The Court of Appeals attempts to distinguish this rule by the fact that, unlike *Cantrell*, McCoy did not write the editorial or participate in the decision to print it. It thereby ignores fundamental principles of libel law in its holding.

"Publication" is a term of art in libel law. It includes not only the dissemination of libelous matter, but also the acts of requesting, aiding, or procuring another to publish defamatory matter, *Laun v. Union Electric Co. of Missouri*, 350 Mo. 572, 166 S.W.2d 1065, 1070, 144 A.L.R. 622 (1943). If McCoy aided in the production of the editorial—which he obviously did by furnishing the factual content appearing therein—then he became one of the people "legally responsible for the defamatory publication," *Laun, supra*, 166 S.W.2d, at 1070. The fact that McCoy did not decide whether the editorial would be printed does not diminish the effect of this rule any more than did the fact that the reporter in *Cantrell* did not decide whether his employer would print the article he submitted.

The instant case compels the grant of certiorari. The logical result of the Court of Appeals' rule will be that newspapers will compartmentalize their fact-finding and writing functions since liability can only be imposed by persons occupying the latter status. Rewarding a newspaper for the calculated deceit of an employee it retains to gather information will further none of the interests sought to be protected in *New York Times*. Protection of calculated deceit constitutes an unnecessary denigration of "the individual's right to the protection of his own good name . . . ." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 341 (1974).

CONCLUSION

For the reasons stated, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 86-2180

Don R. Speer, Appellant,

v.

Ottaway Newspapers, Inc.,
Appellee.

No. 86-2222

Don R. Speer, Appellee,

v.

Ottaway Newspapers, Inc.,
Appellant.

Appeals from the United States District Court
for the Western District of Missouri.

Submitted: April 13, 1987
Filed: September 9, 1987

Before McMILLIAN, Circuit Judge, BRIGHT, Senior Circuit Judge, and FAGG, Circuit Judge.

FAGG, Circuit Judge.

Don R. Speer, a police officer, appeals the entry of judgment notwithstanding the verdict against him in his

libel suit against Ottaway Newspapers, Inc., owner of the Joplin, Missouri, *Globe*. The district court based its posttrial ruling on the insufficiency of evidence to establish the *Globe*'s actual malice. Speer argues the court committed error in refusing to attribute to the *Globe* the knowledge of its reporter gained in the course of his employment, regardless of the nature of the reporter's role in the publication of the libelous statement. We affirm.

Max McCoy, a reporter for the *Globe*, was arrested by Speer on April 23, 1983, while taking photographs at a demonstration in front of a gay bar. McCoy told *Globe* editors Speer and the other police officers present used excessive force in making the arrest. An article reflecting both the police's and McCoy's versions of the incident, written by another *Globe* reporter, appeared in the *Globe* the next day. On April 26 the *Globe* published an editorial condemning Speer's conduct at the demonstration and stating specifically that while McCoy was "cuffed and defenseless, the officers continued to strike him, kick him." This statement became the basis for Speer's claim of libel as submitted to the jury, and the jury awarded Speer $100,000 actual damages and $50,000 punitive damages.

A jury believing the evidence introduced by Speer and discounting conflicting testimony could determine McCoy knew the account of the arrest he relayed to *Globe* editors was false and that the *Globe*'s editorial incorporated some portion of McCoy's falsehood. Under the first amendment, however, Speer's award may be reinstated only if the *Globe* published the offending statement with " 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it

was false or not." *New York Times Co. v. Sullivan*, 376 U.S. 254, 280 (1964). Speer did not challenge the district court's instruction requiring the jury to find actual malice on the part of "the officers or employees of [the *Globe*] having responsibility for the publication of such statement," *see id.* at 287, and the district court granted judgment notwithstanding the verdict on the ground Speer failed to offer adequate evidence on this issue.

The issues we must decide are first, whether under the record in this case Speer has established with convincing clarity, *see id.* at 285-86, that McCoy was a person "having responsibility for the publication" of the April 26 editorial. If he was, his knowledge of falsity was effectively made known to the *Globe* and the *Globe* may be held liable to Speer. Second, if McCoy was not responsible for the editorial's publication, we must determine if those persons who were responsible either knew McCoy was lying or published with reckless disregard for whether or not he was telling the truth.

On review we make an independent examination of the whole record to ensure the principles of actual malice have been constitutionally applied. *Id.* at 285; *see generally Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 501-11, 506 n.25 (1984). This duty of review cannot be delegated, regardless of whether the trier of fact is judge or jury. *Bose Corp.*, 466 U.S. at 501. Our obligation is independently to judge whether Speer has established by clear and convincing evidence, *see id.* at 511, 513; *New York Times*, 376 U.S. at 285-86, that the *Globe*'s editorial is not entitled to first amendment protection in this case.

Speer to establish the *Globe*'s actual malice argues McCoy was acting in the course and scope of his employ-

ment when he covered the demonstration and when he transmitted his false version of the arrest incident to his superiors. Thus, Speer claims the *Globe* is vicariously liable because McCoy's state of mind (actual knowledge of the falsity) is imputed to the *Globe* under traditional principles of respondeat superior. *See, e.g., Cantrell v. Forest City Publishing Co.*, 419 U.S. 245, 253-54 (1974) (publisher vicariously liable when sufficient evidence for jury to find reporter's own writing of feature story was within scope of his employment); *Douglass v. Hustler Magazine, Inc.*, 769 F.2d 1128, 1139-40 (7th Cir. 1985) (magazine liable under respondeat superior when photography editor fraudulently obtained release to print photographs). The difficulty with Speer's argument is that based on essentially undisputed facts in this case, the district court found a lack of clear and convincing evidence McCoy had anything to do with publication of the challenged editorial. We agree.

McCoy after his arrest was taken off the story of the April 23 demonstration, and his input into the editorial was limited to several meetings with *Globe* editors during which he was treated like any other outside source. He had no input in suggesting the topic for the editorial, making recommendations regarding the editorial's content, writing or reviewing the editorial before publication, or deciding whether the editorial would be published. He also did not exercise on behalf of the *Globe* any editorial judgment through the compilation, assimilation, evaluation, or presentation in print, of fact or opinion. Photographs McCoy took at the demonstration were not used in connection with the editorial. In short, McCoy contributed to the *Globe*'s publication of the editorial only to the same degree as would any other citizen who

participated in, became involved in, or observed a news event and provided the *Globe* with a firsthand account. A reporter like McCoy, who is relegated solely to the role of an outside source and who has nothing to do with publication of the libelous material, is not responsible on behalf of a news organization for the ultimate publication of information given. Thus, a finding of institutional actual malice by the *Globe* may not be based only on McCoy's state of mind.

In refusing to hold the *Globe* liable here based only on McCoy's knowledge we neither grant newspapers free rein to rely on deceitful employees nor establish a rule so inflexible as to create the specter Speer suggests of newspapers shielding themselves from liability by separating the writing and reporting functions. Speer implies publishers could thus insulate themselves by effectively preventing the actual malice state of mind from ever being "brought home to the persons in the [news] organization having responsibility for the publication." *New York Times*, 376 U.S. at 287. We need not here determine the exact contours of the *New York Times* requirement, however, because McCoy for the purposes of this editorial was treated by his editors solely as an outside source. Given McCoy's singular role in the editorial process, the district court properly refused under *New York Times* to impute McCoy's knowledge to the *Globe*.

Even if McCoy was not responsible for publication of the editorial, the *Globe* may still be liable if some person having responsibility for the editorial published the commentary with the sort of actual malice defined in *New York Times*. There is no evidence in the record, nor does Speer argue, that the persons at the *Globe* who

were responsible for publication of the April 26 editorial had actual knowledge McCoy was lying. Rather, Speer argues those persons acted with reckless disregard for the truth. Speer to prove reckless disregard had to show the *Globe* published the April 26 editorial despite a "high degree of awareness of [the] probable falsity" of the editorial's content. *See Garrison v. Louisiana*, 379 U.S. 64, 74 (1964). In evaluating the *Globe*'s actions,

> reckless conduct is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing. There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication. Publishing with such doubts shows reckless disregard for truth or falsity and demonstrates actual malice.

St. Amant v. Thompson, 390 U.S. 727, 731 (1968).

A newspaper cannot automatically shield itself from a finding of actual malice by asserting, as the *Globe* does here, that it published with a good faith belief the offending statements were true. *Id.* at 732. A plaintiff is free to prove, for example, the story was entirely the product of the newspaper's imagination, the newspaper had reason to doubt the veracity of its sources, or the story was so implausible that only a reckless person would have published it. *Id.*

The *Globe* in this case, however, had no reason to doubt its source, because it knew McCoy as a trusted employee and believed him to be reliable, honest, and good with details. The *Globe* also knew from McCoy's physical injuries and broken camera the arrest had been other than an ordinary, peaceful incident; thus, McCoy's

story was not inherently improbable. Neither is actual malice suggested by the *Globe*'s failure to interview Speer or any of three other citizen witnesses identified in the police report or by the *Globe*'s failure to heed the phone call from a demonstrator warning McCoy's story was a "pack of lies." The *Globe* already knew both versions of the arrest, and at least two eyewitnesses had corroborated McCoy's version.

The record before us does not suggest with convincing clarity other than that the *Globe* published the April 26 editorial with knowledge of conflicting versions of the arrest. In hindsight it may well have been prudent journalistic practice to pursue known leads on the story. Not to do so in some circumstances might conceivably suggest professional negligence. Even so, a negligent failure to investigate does not itself establish recklessness for purposes of a libel suit. *St. Amant,* 390 U.S. at 733; *New York Times,* 376 U.S. at 288.

The record shows McCoy's story was not inherently improbable, and there is no evidence to suggest the story generated serious doubts of the type showing reckless disregard of the truth by those responsible for the editorial's publication. A publisher's failure accurately to guess which of two conflicting accounts a jury might later believe does not demonstrate actual malice. A newspaper may not constitutionally be required to determine truth by counting the number of witnesses on each side. To find liability in these circumstances would undermine the purpose for which the Supreme Court in *New York Times* adopted the actual malice requirement—to prevent the self-censorship that may arise if a critic of official conduct were compelled to guarantee the actual truth of all factual assertions on pain of a libel judgment vir-

tually unlimited in amount. *See* 376 U.S. at 279. *New York Times* did not require the *Globe* to be right or be silent, but only to refrain from stating facts in its editorial with knowledge those facts were false or with reckless disregard of their truth or falsity.

Because Speer did not make a submissible case on McCoy's responsibility for the publication or on actual malice by those who were responsible, the district court did not commit error in granting the *Globe* judgment notwithstanding the verdict. In light of our disposition of the actual malice issues, we need not consider the *Globe*'s cross-appeal. We affirm.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.

APPENDIX B

(Filed August 29, 1986)

IN THE
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT
OF MISSOURI
SOUTHERN DIVISION

No. 84-5108-CV-SW-4

DON R. SPEER,
Plaintiff,

v.

OTTAWAY NEWSPAPERS, INC.,
Defendant.

ORDER GRANTING DEFENDANT'S MOTION FOR A JUDGMENT NOTWITHSTANDING THE VERDICT AND DENYING DEFENDANT'S ALTERNATIVE MOTION FOR A NEW TRIAL

On May 11, 1984, plaintiff, a police officer with the Joplin Police Department filed this libel action against the defendant Ottaway Newspapers, Inc. for language used in a editorial published on April 26, 1983, in the defendant's wholly owned and operated newspaper, the *The Joplin Globe* (hereinafter *"The Globe"*). The entire April 26, 1983 editorial is set out in the footnote below.[1]

1. Excessive force

The excessive force used by police officers Saturday night against a reporter for this newspaper, Max McCoy, was inexcusable, unjustified and unprofessional.

(Continued on following page)

This case was tried the week of July 7, 1986, and the jury returned a verdict in favor of the plaintiff for $100,000.00 actual damages and $50,000.00 punitive damages.

Footnote continued—

McCoy was covering an anti-gay demonstration on Main Street when he was charged with allegedly interfering with an officer who was attempting to serve a complaint to a person who was parading without permit. There are any number of interpretations to be given the term "interfering," so that can be set aside for now.

But the following violence that McCoy was subjected to is given to only one interpretation—brutality, committed by police officers who are supposed to abide by and enforce the law, to quell violence, not cause it.

An account of the nasty event plainly disclosed overreaction—uncontrollable overreaction—by officer Don Speer when reporter McCoy was apparently mistaken for a customer of Billy's II Lounge, 722 Main St., the object of the public protest. This was indicated when Speer ordered McCoy, who was taking photographs, "to get back inside the bar."

McCoy then tried to explain to Speer that he hadn't been in the bar, that he was a reporter for The Globe and on assignment. But officer Speer persisted that McCoy had no right to be taking pictures and to "get back inside."

At that point the highly charged situation deteriorated. Reporter McCoy was knocked to the ground, his camera destroyed. Other officers jumped in while McCoy was down, they handcuffed him. And while he was cuffed and defenseless, the officers continued to strike him, kick him.

What kind of law enforcement measures are these? What kind of peace is being kept on our city streets when a newspaper reporter is prevented, and in such a savage manner, from attempting to do his job just as the police officers were trying to do their job?

McCoy was arrested, charged with interfering with an officer. He suffered injuries from the beating, for which he was treated at St. John's Medical Center and released.

A reporter happened to be the victim of barbaric police action Saturday night. Next time it could be anyone.

We strongly recommend that officer Don Speer and other officers that participated in the beating of reporter McCoy be suspended from the force, pending an investigation by appropriate officials of the Joplin Police Department.

Present before the Court is defendant's motion for a judgment notwithstanding the verdict and in the alternative for a new trial pursuant to Federal Rule of Civil Procedure 50 and 59. Plaintiff filed his suggestions in opposition to defendant's motion on August 25, 1986. After careful consideration of the post-trial pleadings and evidence adduced at trial, the Court will grant defendant's motion for a judgment notwithstanding the verdict and deny defendant's motion for a new trial for the reasons set forth below.

JUDGMENT NOTWITHSTANDING THE VERDICT

Defendant has raised seven reasons why the Court should grant its motion for a judgment notwithstanding the verdict (hereinafter judgment n.o.v.). We need only discuss the plaintiff's failure to make a submissible case on the grounds that there was no evidence that any of the officers or employees of the defendant *having responsibility for publication of the editorial* published such editorial with knowledge that it was false or with reckless disregard as to whether it was true or false at a time when said officers or employees of defendant had serious doubt as to whether it was true or false.

Before examining the plaintiff's failure to make a submissible case, the Court will review the standards for granting judgment n.o.v. A judgment n.o.v. may be granted when, without weighing the credibility of the witnesses or substituting the Court's judgment for that of the jury, there is no evidence of substance upon which reasonable persons could differ. *Karlen v. Ray E. Freidman & Co. Commodities,* 688 F.2d 1193, 1197 (8th Cir. 1982); *Tackett v. Kidder,* 616 F.2d 1050, 1052-53 (8th Cir. 1980).

"The standards for granting a judgment n.o.v. are the same as governing directing a verdict." *Armstrong v. Republic Realty Mortgage Corp.*, 631 F.2d 1344, 1351 (8th Cir. 1980). The standard governing the directing of a verdict is sufficiently set forth in *Martin v. White*, 742 F.2d 469, 472 (8th Cir. 1984), as follows:

> 'It is fundamental that a motion for directed verdict is properly denied where the evidence presented allows reasonable men in a fair exercise of their judgment to draw different conclusions. A directed verdict is in order only where the evidence points *all one way* and is susceptible of *no* reasonable inferences sustaining the position of the non-moving party. * * * In making this determination, the evidence, together with all reasonable inferences to be drawn therefrom, must be viewed in the light most favorable to the non-moving party.' (Citations omitted)
>
> In applying the above standard, the Court must: (1) resolve direct factual conflicts in favor of the non-movant, (2) assume as true all facts supporting the non-movant which the evidence tended to prove, (3) give the non-movant the benefit of all reasonable inferences, and (4) deny the motion if the evidence so viewed would allow reasonable jurors to differ as to the conclusions that could be drawn.

Dace v. A.C.F. Industries, Inc., 722 F.2d 374, 375 (1983), *supplemented*, 728 F.2d 976 (8th Cir. 1984). "Similarly, where the first amendment mandates a 'clear and convincing' standard, the trial judge in disposing of a directed verdict motion should consider whether a reasonable fact-finder could conclude, for example, that the plaintiff had shown actual malice with convincing clarity." *Anderson v. Liberty Lobby, Inc.*, No. 84-1602, slip op. at 10 (U.S. June 25, 1986).

The United States Supreme Court held in *Anderson* that a Court ruling on a motion for summary judgment must be guided by the "*New York Times* clear and convincing evidentiary standard" in determining whether a genuine issue of actual malice exists in a libel action brought by a public official or public figure.

> Just as the 'convincing clarity' requirement is relevant in ruling on a motion for directed verdict, it is relevant in ruling upon a motion for summary judgment. When determining if a genuine factual issue as to actual malice exists in a libel suit brought by a public figure, a trial judge must bear in mind the actual quantum and quality of proof necessary to support liability under *New York Times*. For example, there is no genuine issue if the evidence presented in the oposing affidavit is of insufficient caliber or quality to allows a rational finder of fact to find actual malice by clear and convincing evidence. *Id.* at 11.

In *New York Times Co. v. Sullivan,* 376 U.S. 254 (1964), and *Curtis Publishing Co. v. Butts,* 388 U.S. 130 (1967), the Supreme Court held that public figures and public officials may not recover in a libel action unless they "prove[ ] that the [challenged] statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not." *New York Times,* 376 U.S. at 279-80; *Curtis Publishing Co.,* 388 U.S. at 162. "Judges as expositors of the Constitution, must independently decide whether the evidence in the record is sufficient to cross the constitutional threshold that bars the entry of any judgment that is not supported by clear and convincing proof of

'actual malice.'" *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 511 (1984).

Even though the jury returned a favorable judgment for the plaintiff, it is this Court's duty, nevertheless, to hold as a matter of law that the record does not contain clear and convincing evidence that the employees of the defendant with responsibility for *publishing the challenged statement*, did so with knowledge that it contained a false statement, or with reckless disregard for the truth. *Bose Corp.* 466 U.S. at 513.

> The mere presence of the stories in the files does not, of course, establish that the Times "knew" the advertisement was false, since *the state of mind required for actual malice would have to be brought home to the persons in the Times' organization having responsibility for the publication of the advertisement.* With respect to the failure of those persons to make the check, the record shows that they relied upon their knowledge of the good reputation of many of those whose names were listed as sponsors of the advertisement, and upon the letter from A. Philip Randolph, known to them as a responsible individual, certifying that the use of the names was authorized. (Emphasis added).

New York Times Co., 376 U.S. at 287.

There is no dispute between the parties as to whether the *New York Times* rule applies in this case. Plaintiff, as a Joplin police officer, is considered a public official. In *Rosenblatt v. Baer*, 383 U.S. 75, 85 (1966), the Court stated that "the 'public official' designation applies at the very least to those among the heirarchy of government employees who have or appear to the public to have, sub-

stantial responsibility for or control over the conduct of governmental affairs." *See also, Roberts v. Dover,* 525 F.Supp. 987, 990 (M.D. Tenn. 1981). Furthermore, the challenged editorial deals with excessive force used by police officers and is a matter of great public concern. Few other discussions of public concern could make a greater claim for first amendment protection. "Certainly, speech about government and its officers, about how well or badly they carry out their duties, lies at the very heart of the first amendment." *Janklow v. Newsweek, Inc.,* 788 F.2d 1300, 1304 (8th Cir. 1986). Unquestionably, plaintiff is a public official and the challenged statement deals with a public concern.

Therefore, the rule proclaimed in the *New York Times* case must be applied in this action. In *Garrison v. State of Louisiana,* 379 U.S. 64 (1964), the Supreme Court refined its standard stating that "only those false statements made with the high degree of awareness of their probable falsity demanded by *New York Times* may be the subject of either civil or criminal sanctions." *Garrison,* 379 U.S. at 74.

Since the Supreme Court's decision in *New York Times,* the courts have sought an appropriate balance between two important yet often conflicting interests: (1) the interest in assuring vigorous and robust debate on public issues; and (2) the interest in protecting the reputation of each individual from unjustified defamatory attacks. *Bagley v. Iowa Beef Processors, Inc.,* No. 83-1894, slip op. at 18 (8th Cir. Jul. 24, 1986). In cases involving the area of tension between the first and fourteenth amendments on the one hand and state defamation laws on the other, the Court must review "the evidence in the . . . record to determine whether it would constitutionally

support a judgment" for the plaintiff. *New York Times*, 376 U.S. at 284-85; *Time, Inc. v. Pate*, 401 U.S. 279, 284 (1971).

Thus, a brief description of the sequence of events and the facts not in dispute is in order.

Max McCoy was a general assignment reporter for *The Globe* on April 23, 1983. Mr. McCoy pursued a major in communications with a journalism emphasis at Pittsburg State University in Pittsburg, Kansas. He attended that institution for approximately 3 1/2 years but did not obtain a degree. Before working for *The Globe*, Mr. McCoy was employed by the *Pittsburg Morning Sun* newspapers in Pittsburg, Kansas. While employed at the *Pittsburg Morning Sun*, Mr. McCoy had worked the "police beat." Mr. McCoy began working for *The Globe* in approximately September 1982. Mr. McCoy was a fulltime general assignment reporter on April 23, 1983. He had been with *The Globe* in some capacity for approximately eight months.

On Saturday, April 23, 1983, the editor in charge at *The Globe* was Gary Garton. Mr. Garton received information that a demonstration was under way in front of "Billy's Bar." On the previous Saturday a group of anti-gay demonstrators had picketed "Billy's Bar" and the demonstration was covered on the front page of *The Globe*. Mr. Garton asked Mr. McCoy to go to the scene of the demonstration. *The Globe's* photographer, Greg Sanders, was detained at the scene of another news story. There was evidence that Mr. McCoy was sent to report and photograph the demonstration.

Mr. Speer, a patrolman with the Joplin Police Department, took several demonstrators aside and began

issuing citations for unlawful picketing. Mr. McCoy began taking pictures of the plaintiff and a demonstrator. There was evidence that one of the demonstrators became agitated with the manner in which Mr. McCoy was taking his picture. Mr. Speer repeatedly asked Mr. McCoy to step back and not to interfere with his issuing of the citations. Mr. McCoy informed the officer and the demonstrator that he had a constitutional right to be there. Mr. McCoy admits that the officer warned him that if he did not move back that he would be arrested. At this point, the parties differ as to how the altercation occurred. Plaintiff testified that upon attempting to arrest Mr. McCoy, that Mr. McCoy struck the plaintiff in the head while they were crossing the street to the police vehicle. Mr. McCoy testified that he never struck the police officer and tried to go peacefully. In either event, the plaintiff and Mr. McCoy did end up on the ground in a struggle which inflicted injuries upon Mr. McCoy. Mr. McCoy was put into the police car and was later taken to the police station and charged with interfering with a police officer. An additional charge of assault was filed against Mr. McCoy by the plaintiff two days later on Monday, April 25, 1983.

Plaintiff contends that the statement in the April 26, 1983 editorial which reads "[a]nd while he (Mr. McCoy) was cuffed and defenseless, the officers continued to strike him, kick him" is false and has damaged plaintiff's reputation as a respected police officer.

Mr. McCoy's account of his arrest is virtually that which is reported in the editorial. However, Mr. McCoy did not write the editorial. Nor was there any evidence that Max McCoy had any responsibility for publication of the editorial. In fact, the only evidence introduced

at trial was to the contrary. Those responsible for publishing the editorial and the decision to publish the editorial testified that Mr. McCoy had not seen the editorial before its publication and had no controlling role in deciding whether the editorial would be published.

The plaintiff has failed to prove by clear and convincing evidence that those responsible for publishing the editorial knew that the editorial was false or that it was published with reckless disregard for whether it was true or false. There was no evidence that those responsible for publishing the editorial should have seriously doubted the truthfulness of Max McCoy's account of the incident which occurred on April 23, 1983.

Plaintiff's argument is a case of first impression. Uniquely, the plaintiff argues that the defendant should be held liable for the reported defamatory statements, if the plaintiff can prove that Max McCoy had firsthand knowledge that the facts he gave those responsible for publishing the editorial were false. In essence, this would make the newspaper liable according to the theory of respondeat superior. The Court determined before the case was submitted to the jury, that the only evidence sufficient for plaintiff to make a prima facie case was, if Mr. McCoy's knowledge was imputed to those responsible for publishing the editorial. Therefore, the Court, at the request of plaintiff's counsel, instructed the jury as follows:

> Under the law the defendant is held to know all facts known by its employees if the employees learn of the facts while acting with the scope and course of their employment.

> Acts are within the "scope and course of employment" as that phrase is used in this instruction if:
>
> 1. They were a part of the work the employee was employed to perform, and
>
> 2. They were done by the employee to serve the business of Ottaway Newspapers, Inc.
>
> Therefore, if you find that contributing facts to the publication of the editorial was within the scope and course of the employment of Max McCoy and if you further find that Max McCoy knew that the statement he made that "and while he was cuffed and defenseless, the officers continued to strike him, kick him" was false, then you may find that defendant knew that these statements were false.

Court's Instruction No. 6. The Court is now convinced that this instruction was given in error. Had Mr. McCoy written or controlled the publication of *The Globe* editorial, then the instruction would conceivably not been error.

Plaintiff relies on *Cantrell v. Forest City Publishing Co.*, 419 U.S. 245, 253 (1974). In *Cantrell*, the case was allowed to go to the jury on the "false light" theory of invasion of privacy. The jury was given a respondeat superior instruction. *Id.* at 253 n.6. In that case, the person who prepared the story obviously knew of the falsehoods in the story. Furthermore, the falsehoods in the story were admitted by the defendant and the instruction was not objected to by either party.

In the case at bar, those responsible for publishing the April 26, 1983 editorial entitled "Excessive force" conducted their own investigation. No one at *The Globe*,

including Mr. McCoy, was aware of the assault charge filed by the plaintiff against Mr. McCoy until Mr. McCoy was arraigned several weeks later. Shortly after Mr. McCoy was arrested, Greg Sanders, another photographer for *The Globe,* arrived at the scene in front of "Billy's Bar." He did not know of Mr. McCoy's arrest. Mr. Sanders conversed with many of the demonstrators and the plaintiff. Mr. Sanders testified that plaintiff told him that plaintiff had some trouble with a man from inside the bar but that he took care of it and showed Mr. Sanders his knuckles or a place on his hand indicating that he had fought with someone. Mr. Sanders then learned that Mr. McCoy was in a police car across the street under arrest and went to speak with him. Mr. Sanders then returned and told the plaintiff that the man he had arrested was a *Globe* reporter. Plaintiff had not been aware that Mr. McCoy was a *Globe* reporter. Mr. Sanders testified that he spoke with four or five people at the demonstration who had observed the incident and told him that they thought excessive force had been used to arrest Mr. McCoy.

Mr. Sanders then returned to *The Globe* and told the editor in charge, Gary Garton, that Mr. McCoy had been arrested. The editor, Jim Ellis, and the managing editor, Tom Murray, were summonsed to *The Globe* office by Mr. Garton. Mr. Sanders relayed the information he had gathered from his conversation with the observers at the demonstration to Mr. Ellis, Mr. Murray and Bob Cooper, the author of the editorial. Tom Murray and Jim Ellis interrogated Mr. McCoy about the incident on Saturday, April 23, 1983 and again on Monday afternoon, April 25, 1983. After speaking with Mr. McCoy for approximately 20 minutes Saturday night, Mr. Murray

took Mr. McCoy to the emergency room at St. John's Hospital for treatment for his injuries. Mr. McCoy's visible injuries were consistent and could not help but corroborate his version of the incident which occurred on April 23, 1986, between himself and the police officer.

During plaintiff's evidence, Officer Terry Hilton testified that he overheard Mr. Murray tell Max McCoy on their way out of the police station, "we're going to have some fun with this." Accepting this evidence as true, it does not mean that Mr. Murray had any knowledge that the story concerning Mr. McCoy's arrest was false or that he doubted the truthfulness of Mr. McCoy's version of the events. To the contrary, it would appear that Mr. Murray was convinced that the story was true and should be reported to the public.

The next working day (Monday morning April 25, 1983) Greg Taylor, general manager of *The Globe*, met with Jim Ellis, editor, and Tom Murray, managing editor, to discuss the gathering of more information about the incident. After this conference, the personnel at *The Globe* attempted to obtain copies of the police reports which were ordinarily available. However, they were unsuccessful in obtaining a report of the incident between plaintiff and Mr. McCoy until approximately one month after the editorial was published. The Joplin Police Department refused to release the report to the public.

Globe employees testified that at least two individuals called *The Globe* stating that they had observed events consistent with Mr. McCoy's statement. Plaintiff introduced evidence that Hazel Bearden, one of the demonstrators present during the altercation had called *The Globe* on Monday and told them that the article which

appeared on Sunday, April 24, 1986, written by Barbara Wycliff was a "pack of lies." However, on cross examination, Mrs. Bearden admitted that she did not see the scuffle which occurred between Mr. McCoy and the plaintiff. Mrs. Bearden did not know who she spoke with at *The Globe* and none of the employees at *The Globe* admitted receiving a phone call from Mrs. Bearden. Although Bob Cooper, the author of the editorial, on cross examination, admitted having heard something about a phone call stating that Sunday's story was a "pack of lies," he did not recall if he heard this before the editorial was published or at some later time. Importantly, Mrs. Bearden could not have injected doubts upon those responsible for publishing the editorial when she admitted at trial that she had not seen the struggle between Mr. McCoy and the officer. In fact, Mrs. Bearden testified that when the plaintiff and Mr. McCoy "started to the ground" she turned her head and hid her eyes with her hands.

When faced with the generality of Mrs. Bearden's notice to *The Globe* and the corroborated statements of several trusted and reliable employees, it can hardly be said that those responsible for publishing the editorial acted in total disregard for the truthfulness of the challenged statement or that they should have had serious doubts about the validity of Mr. McCoy's story.

On Monday afternoon, Bob Cooper, editor of the editorial page and author of the editorial in question, Jim Ellis, editor and Tom Murray, managing editor, and Greg Taylor, general manager, as well as others met with Max McCoy and he again explained the events which occurred in front of "Billy's Bar" on April 23, 1986. Mr. McCoy

again displayed his wounds which he received in the altercation to be viewed by those responsible for publishing the editorial. There is no evidence as to whether any employees of the defendant contacted or attempted to contact plaintiff for his version of the facts of the events which took place on April 23, 1983, in front of "Billy's Bar" between him and Mr. McCoy.

Mr. Richard Barker, president of *The Globe* testified that Greg Taylor would have approved the April 26, 1983 editorial. Mr. Taylor and Mr. Cooper testified that they believed Max McCoy because they knew him to be a passive and reliable employee. They believed that the injuries they observed on Mr. McCoy indicated an excessive use of force under the circumstances. They had also spoken with Mr. Sanders whose testimony corroborated that of Mr. McCoy's after speaking to several observers at the scene.

Perhaps more importantly, Mr. Cooper and Mr. Taylor had spoken with Barbara Wycliff who had written the front page story in Sunday's, April 24, 1986 *Joplin Globe* concerning the account of the altercation between Mr. McCoy and Mr. Speer. Mrs. Wycliff testified that the report she read at the police station on the night of the incident (April 23, 1983) did not mention any force used by Mr. McCoy to resist the arrest. She was certain that there was no mention of an assault by Mr. McCoy upon the police officer/plaintiff. She also testified that she had reviewed the official report released approximately one month later and it was not the same report that she had reviewed on the night of the incident.

The Court notes that in *Roberts v. Dover*, 525 F.Supp. 987 (M.D. Tenn. 1981), the Court held that a journalist

which criticized a police officers' activities based upon a one-hour telephone interview with the victim of the alleged police harassment is permitted under the *New York Times* standard to exercise his judgment in favor of publication without fear of civil liability. *Id.* at 993. Certainly, Mr. Cooper and the editorial staff were entitled to rely upon statements from Mr. Sanders, Barbara Wycliff and Mr. McCoy. "A rule to the contrary would unnecessarily restrict the ability of the press to perform in its constitutionally protected role as a guardian against possible abuses of power." *Roberts,* 525 F.Supp. at 993.

The interesting twist to this case, is that one of the subjects of the editorial (Max McCoy) was a reporter for the defending newspaper. Plaintiff contends that the reporter knew his account of the facts to be false. He further contends that that knowledge can be imputed to those responsible for writing and approving the editorial.

Plaintiff contends that the editorial staff relies upon its reporters for its factual information and therefore any knowledge Mr. McCoy had concerning the truthfulness of the statements of fact in the editorial was imputed to the defendant. "Some tension necessarily exists between the need for a vigorous and unhibited press and the legitimate interests in redressing wrongful injury." *Gertz v. Robert Welch, Inc.,* 418 U.S. 323, 342 (1973). *The New York Times* standard administers an extremely powerful antidote to the inducement to media self-censorship of the common-law rule of strict liability for libel and slander. *Gertz,* 418 U.S. at 342. "And it exacts a correspondingly high price from the victims of defamatory falsehood. Plainly, many deserving plaintiffs, including some intentionally subjected to injury, will be unable to surmount the barrier of the *New York Times* test. *Id.*

Neither party nor the Court has located a case directly in point concerning the imputation of Mr. McCoy's knowledge to the defendant, Ottaway Newspapers, Inc. The Court is convinced that under the present state of the law, plaintiff has failed by any proper test to prove by clear and convincing evidence that the April 26, 1983 *Globe* editorial entitled "Excessive force" was published in reckless disregard of the truth about a public officer.

"There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of this publication. Publishing with such doubt shows reckless disregard for the truth or falsity and demonstrates actual malice." *St. Amant v. Thompson,* 390 U.S. 727, 731 (1967). Nothing in plaintiff's evidence indicates an awareness by the author of the editorial or those that approved the editorial of the probable falsity of Mr. McCoy's account of the incident which occurred April 23, 1983, before the editorial was published on April 26, 1983.

> It may be said that such a test puts a premium on ignorance, encourages the irresponsible publisher not to inquire, and permits the issue to be determined by the defendant's testimony that he published the statement in good faith and unaware of its probable falsity. Concededly the reckless disregard standard may permit recovery in fewer situations than would a rule that publishers must satisfy the burden of the reasonable man or the prudent publisher. But *New York Times* and succeeding cases have emphasized that the stake of the people in public business and the conduct of public officials is so great that neither the defense of truth nor the standard of ordinary care would protect against self-censorship and thus ade-

quately implement First Amendment policies. Neither lies nor false communications serve the ends of the First Amendment and no one suggests their desirability or further proliferation. But to insure the ascertainment and publication of the truth about public affairs, it is essential that the First Amendment protect some erroneous publications as well as true ones. . . . Professions of good faith will be unlikely to prove persuasive, for example, where a story is fabricated by the defendant, is the production of his imagination, or is based wholly upon an unverified anonymous telephone call. Nor will they be likely to prevail when the publisher's allegations are so inherently improbable that only a reckless man would have put them in circulation. Likewise, recklessness may be found where there are obvious reasons to doubt the veracity of the informant or the accuracy of his reports.

St. Amant v. Thompson, 390 U.S. 731-32.

An examination of the whole record has satisfied this Court that "the proof presented to show actual malice on the part of the defendant lacks the convincing clarity which the constitutional standard demands. . . ." *New York Times,* 376 U.S. at 285-86; *See Beckley Newspapers Corp. v. Hanks,* 389 U.S. 81, 83 (1967) (per curiam).

MOTION FOR NEW TRIAL

A motion for a new trial is addressed to the discretion of the trial court. *Sanden v. Mayo Clinic,* 495 F.2d 221, 226 (8th Cir. 1974). Even though the Court has admitted that it believes that Instruction No. 6 was given in error, it does not believe that there are sufficient grounds to grant a new trial. This case involves a novel question of law regarding the liability of a newspaper under the theory of respondeat superior and whether the knowledge of one of the newspaper's reporters can be imputed to the defendant newspaper.

The Court sees no benefit in granting a new trial. If Max McCoy's knowledge can be imputed to the defendant newspaper regarding the challenged statement in the published editorial written by someone other than Max McCoy then the jury verdict should be allowed to stand. Given the evidence adduced at trial, the Court is convinced that plaintiff failed to prove by clear and convincing evidence that those responsible for publishing the challenged statement in the April 26, 1986 editorial published such editorial with knowledge that it was false or with reckless disregard for whether it was true or false at a time when said officers or employees responsible for the publication had serious doubt as to whether the facts stated in the editorial were true or not. The Court believes that any error in instructing the jury regarding the law of respondeat superior is corrected by the granting of defendant's motion for a judgment n.o.v. If this Court is incorrect and Max McCoy's knowledge of the incident which occurred April 23, 1986, in front of "Billy's Bar" involving the plaintiff can be imputed to the defendant, and this jury obviously found that this statement "and while he

(Mr. McCoy) was cuffed and defenseless the officers continued to strike him, kick him" was false, then the jury verdict should be allowed to stand. Defendant's other grounds for a new trial are without merit. Accordingly, and for the above reasons, it is

ORDERED that defendant's motion for a judgment notwithstanding the verdict be, and hereby is, granted; and it is further

ORDERED that defendant's motion for a new trial is hereby denied.

/s/ Russell G. Clark
Russell G. Clark
United States District Judge

Aug. 29, 1986

APPENDIX C

Excessive force

The excessive force used by police officers Saturday night against a reporter for this newspaper, Max McCoy, was inexcusable, unjustified and unprofessional.

McCoy was covering an anti-gay demonstration on Main Street when he was charged with allegedly interfering with an officer who was attempting to serve a complaint to a person who was parading without permit. There are any number of interpretations to be given the term "interfering," so that can be set aside for now.

But the following violence that McCoy was subjected to is given to only one interpretation—brutality, committed by police officers who are supposed to abide by and enforce the law, to quell violence, not cause it.

An account of the nasty event plainly disclosed overreaction—uncontrollable overreaction—by officer Don Speer when reporter McCoy was apparently mistaken for a customer of Billy's II Lounge, 722 Main St., the object of the public protest. This was indicated when Speer ordered McCoy, who was taking photographs, "to get back inside the bar."

McCoy then tried to explain to Speer that he hadn't been in the bar, that he was a reporter for The Globe and on assignment. But officer Speer persisted that McCoy had no right to be taking pictures and to "get back inside."

And at that point the highly charged situation deteriorated. Reporter McCoy was knocked to the ground, his camera destroyed. Other officers jumped in while

McCoy was down, they handcuffed him. And while he was cuffed and defenseless, the officers continued to strike him, kick him.

What kind of law enforcement measures are these? What kind of peace is being kept on our city streets when a newspaper reporter is prevented, and in such a savage manner, from attempting to do his job just as the police officers were trying to do their job?

McCoy was arrested, charged with interfering with an officer. He suffered injuries from the beating, for which he was treated at St. John's Medical Center and released.

A reporter happened to be the victim of barbaric police action Saturday night. Next time it could be anyone.

We strongly recommend that officer Don Speer and other officers that participated in the beating of reporter McCoy be suspended from the force, pending an investigation by appropriate officials of the Joplin Police Department.

No. 87-942

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

DON R. SPEER,

Petitioner,

—vs.—

OTTAWAY NEWSPAPERS, INC.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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February 27, 1988

COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Whether the rule set forth in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), and its progeny that a public figure plaintiff in a libel action must show that those individuals having responsibility for the publication of an allegedly defamatory editorial had actual malice as a matter of law forbids the imputation to a corporate defendant of the actual malice of an employee who was a source for an allegedly defamatory editorial, but who had no responsibility for its publication.

2. Whether the principle reaffirmed by this Court in *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485 (1984), that courts make an independent examination of the whole record in libel actions by public figures to ensure that liability is found only when the plaintiff has proved actual malice by clear and convincing evidence deprives a public figure plaintiff of his Seventh Amendment right to a jury trial.

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UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

COUNTERSTATEMENT OF THE CASE

A. Summary of the Factual Record

This lawsuit is about the publication of an editorial ("the editorial") on April 26, 1983 in *The Joplin Globe*. *The Globe* is a daily newspaper published by respondent, Ottaway Newspapers, Inc. ("Ottaway"), through its Joplin Globe division in Joplin, Missouri.[1]

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1 The following information concerning respondent is provided pursuant to Rule 28 of the Rules of this Court. Ottaway is a wholly owned subsidiary of Dow Jones & Company, Inc., and is affiliated with Telerate Inc.

The editorial commented on the brutal manner in which a reporter for *The Globe*, Max McCoy, was arrested by petitioner, a police officer, while he was reporting on a demonstration in front of a bar late on a Saturday afternoon. Immediately after McCoy had been arrested, a *Globe* photographer had arrived at the scene and spoken with witnesses who told him that excessive force was used to arrest McCoy. That evening, editors of *The Globe* twice interviewed McCoy at the newspaper's office about the incident. At each interview McCoy's story was the same: he told his editors that petitioner, without provocation, had kicked and kneed him after knocking him to the ground in the middle of the street. McCoy also showed his editors his dented camera and bruises on his body. McCoy went to the hospital that night for treatment of his injuries. The editors testified at the trial that they believed McCoy's story, and that they knew McCoy to be an honest reporter, well-behaved on assignments.

After being interviewed by his editors, McCoy went home. He did not write an article about the incident.

The *Globe* editors assigned another reporter to cover the story of McCoy's arrest. That reporter looked at records at police headquarters, returned to *The Globe*, and wrote a story that appeared the next day, Sunday. The story included quotations of McCoy about how petitioner and other police officers handled him. It also included a statement from police officials on the arrest.

On Monday, the day after *The Globe* published the news article and two days after McCoy's arrest by petitioner, *Globe* staffers continued to investigate the McCoy arrest. Two phone calls to the paper—the only two calls *Globe* staffers recalled receiving—supported McCoy's account of the incident.

On Monday, the editorial page editor of *The Globe*, Robert Cooper, who had learned of the arrest from the Sunday story in the newspaper, asked his colleagues whether McCoy's statements in the Sunday story were accurate. They replied that they still believed McCoy. Cooper then drafted an editorial about the incident.

When McCoy returned to work that evening, Cooper and other members of the *Globe* news staff interviewed him about the arrest. His account was consistent with his prior accounts of events.

Cooper brought a copy of the draft editorial to the meeting with McCoy and the other editors. McCoy did not read the draft of the editorial at the meeting, or any later draft at any time before the editorial was set to be printed in the paper; did not make any suggestions as to what the editorial should say; did not play any role in Cooper's decision to write an editorial; and did not play any role in the decision of the editors of the paper to publish the editorial on the opinion page of *The Globe*. McCoy was simply a source of information.

The factual account in the editorial was thus based on McCoy's report of the incident, the personal belief of those who had responsibility for publishing the editorial in McCoy's reliability as a source of facts and in his passive and peaceable personality, the visible physical injuries he sustained, the damage to his camera, the medical treatment he received, another reporter's on-the-scene interviews, the investigation of the reporter of the news story, including her visit to police headquarters and her story published in Sunday's *Globe*, public reaction to that story, particularly supporting telephone calls, the absence of a complaint from petitioner or anyone in the Joplin Police Department as to the accuracy of the Sunday news article, and more generally the failure of any information contradicting the account to be brought to the attention of the *Globe* officials responsible for publication of the editorial.

B. Decisions Below

The petitioner brought a diversity action solely against the corporate publisher of *The Globe* in the United States District Court for the Western District of Missouri. McCoy's accounts of the arrest concededly, for purposes of this response, could have been found by the jury to have been made even though he knew they were false or had subjective awareness of their probable falsity. The petitioner did not seek to recover against the

reporter or the publisher for the reporter's accounts, however. The petitioner also did not seek to recover for the factual account of the arrest contained in the newspaper. The jury returned a verdict for the petitioner on the editorial alone. The District Court granted respondent's motion for a judgment n.o.v., holding the petitioner had failed to meet his constitutional burden of showing that any member of the *Globe* staff having responsibility for the publication of the editorial had a subjective awareness of probable falsity in publishing it. That decision was unanimously affirmed by a panel of the Court of Appeals for the Eighth Circuit.

REASONS FOR DENYING THE WRIT

The petition neither raises any important question of federal law that must be decided by this Court or that was decided by the courts below in conflict with decisions of this Court nor shows any conflict among the circuit courts on any issue decided below. In fact, the courts below correctly applied settled constitutional principles to a highly unusual situation in which recovery was sought on the basis of factual statements in an editorial where a newspaper employee having no responsibility for the editorial's publication was the primary source for the factual allegations in the editorial.

As a public official, petitioner, to recover damages, had to show by clear and convincing proof that those having responsibility for the defamatory publication had "actual malice," *i.e.*, they either knew it was false or had a "subjective awareness of probable falsity" with respect to it at the time of publication. *Hustler Magazine, Inc. v. Falwell*, No. 86-1278, Slip. Op. at 5 (U.S. February 24, 1988); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 335 n.6 (1974); *New York Times Co. v. Sullivan*, 376 U.S. 254, 280 (1964). As this Court made clear in *New York Times*, a public official such as petitioner cannot carry this burden simply by showing that an employee of the publisher knew that an article was false or acted in reckless disregard of whether it was true or false. Rather, the public official must

clearly and convincingly show that the employee or employees having actual responsibility for the publication of the defamatory piece harbored "actual malice." *New York Times Co. v. Sullivan*, 376 U.S. at 280. Once such a person is found to have "actual malice," his or her employer may be held liable on principles of *respondeat superior*. The courts below correctly held that no such person had the requisite state of mind.

The District Court and the Court of Appeals both properly fulfilled their constitutionally mandated role by critically reexamining the evidence as to the alleged "actual malice" of the publisher's employees having responsibility for the publication of the editorial. This Court has repeatedly held that such an independent review is essential to the protection of free expression. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986); *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485 (1984). In fact, petitioner's failure of proof was so profound that a court using even a non-First Amendment standard for granting judgment n.o.v. or on appeal would have held that no reasonable jury could have found actual malice on the part of those having responsibility for the publication of the article.

I.

The Courts Below Correctly Applied Settled Principles Of Constitutional Law In Determining That Petitioner Failed To Show "Actual Malice" By Clear And Convincing Proof.

The law is clear that as a public official[2] the plaintiff in this case was required to prove with "convincing clarity," *New York Times Co. v. Sullivan*, 376 U.S. 254, 295-96 (1964), that the editorial was published "with 'actual malice'—that is, [either] with knowledge that it was false," *id.* at 287-88, or with the publisher's "awareness of probable falsity." *St. Amant v.*

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2 The plaintiff conceded that as a police officer he is a public official. The law to that effect is clear. *E.g.*, *Time, Inc. v. Pape*, 401 U.S. 279, 284 (1971); *St. Amant v. Thompson*, 390 U.S. 727, 730 (1968).

Thompson, 390 U.S. 727, 731 (1968), *quoting Curtis Publishing Co. v. Butts*, 388 U.S. 130, 153 (1967) (opinion of Harlan, J.). "There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication." *Id.* at 731.

The obligation of the courts below, then, was to determine whether the corporate defendant published the editorial knowing it was false or while entertaining serious doubts as to its truth. But knowledge as to its falsity or doubt as to truth is a "state of mind." *Herbert v. Lando*, 441 U.S. 153, 160 (1979). And a corporation has no state of mind; only its officers and employees do. The determinative questions before the courts, therefore, became: (1) to whose state of mind does a court look in determining the defendant's "actual malice"? and (2) did the plaintiff establish at all, let alone "with convincing clarity," that those relevant persons in fact did harbor "actual malice" at the time of the editorial's publication?

This Court in *New York Times* answered the first question. In that case, this Court determined that previous *New York Times* articles established the falsity of the allegedly libelous advertisement published by the *Times*. Some—even many—employed by the *Times* knew the advertisement was false. But that was not enough to prove "actual malice" "since [for liability to be established] the state of mind required for actual malice would have to be brought home to the persons in the Times organization having responsibility for the publication of the advertisement." 376 U.S. at 287.

Using this guide, the courts below ruled that as a matter of law the reporter's knowledge could not be imputed to *The Globe* simply because he was acting in the course of his employment when he recounted his version of the arrest. Instead, the courts looked to the evidence to determine who at *The Globe* "ha[d] responsibility," in *New York Times* terminology, for the editorial.

Insofar as a suit based solely on the editorial is concerned, McCoy was not a person who "had responsibility" for publication. As a participant in the arrest, he merely provided information to the newspaper. He did not write an article about the incident, did not know an editorial was contemplated when he first told his story, did not help write the editorial, did not suggest what should be in the editorial, did not know of its contents before it was set in type, and did not participate in the decision to publish it. He acted precisely as would any news source and no more "had responsibility" for the editorial than any one of many sources for an article might. The trial judge and the court of appeals concluded, on undisputed facts, that the persons "having responsibility" for the editorial were the editors who wrote it, decided to publish it, and did publish it. And the courts below therefore properly looked to their state of mind as determinative.

Petitioner confuses the issue when he claims that, because the reporter was an employee of *The Globe*, respondent should be liable for any actionable statements in the editorial under traditional rules of *respondeat superior*. Issues of *respondeat superior* would be raised only if petitioner had sued based on the reporter's conduct—*e.g.*, his statements to his editors—in the scope and course of his employment. Instead, petitioner sued solely on the editorial, trying to impute to the publisher the reporter's alleged knowledge of the falsity of an editorial that he neither prepared nor published. It is that imputation of knowledge from an employee having no responsibility for publication to his employer—not the application of traditional rules of *respondeat superior*, as petitioner claims—that as a matter of law was forbidden by this Court in *New York Times Co. v. Sullivan*.

The application of this Court's holding in *New York Times* by the courts below thus does not conflict with *Cantrell v. Forest City Pub. Co.*, 419 U.S. 245 (1974). In *Cantrell*, this Court allowed a plaintiff to recover against a company whose reporter had made up facts in an article he wrote. Certain descriptions of

the plaintiff in the article were proved to have been fabricated by the reporter; his employer was liable for his writing of the article with "actual malice" on the theory of *respondeat superior*. The distinction between *Cantrell* and this case is determinative: the defendant here, understanding the journalistic risks if not the legal ones, took the reporter off the story immediately upon his personal involvement in it. The reporter did not write the editorial. The normal sort of *respondeat superior* liability for a story written by an involved employee which arose in *Cantrell* therefore never became an issue. Similarly, the issue of imputing knowledge of a reporter to his employer/newspaper never arose in *Cantrell*.

The principles applied by the courts below do not immunize this reporter, other reporters similarly situated or their employers from liability for false and defamatory statements made to others, as petitioner contends. (Petition at 15.) Before any such liability can result, however, those statements must be sued upon so that the appropriate issues of fact and law can be passed upon by the judge and the jury.

By suing on the editorial alone, petitioner raised the issue of the imputation of the reporter's state of mind to the respondent when publishing it. Had the petitioner sued on the basis of the reporter's statements to his superiors, however, the courts below would have been required to focus on the entirely different issue of respondent's liability under *respondeat superior* law for the behavior of the reporter, specifically his alleged libel contained in his statements. *Compare* Restatement (Second) of Agency, Chapter 8, Topic 2, §§ 272-82 (1958) ("Knowledge of Agent") and Seavey, *Agency*, §§ 97-103, pp. 174-187 (1964) *with* Restatement (Second) of Agency, Chapter 7, Topic 2, Title B ("Torts of Servants") and Seavey, *supra*, §§ 82-93, pp. 137-168. The complaint did not raise, and neither of the courts below were called upon to resolve, issues as to the reporter's legal responsibility—and the vicarious liability of the publisher—for the reporter's statements to his editors. Such issues are therefore irrelevant to this petition.

Turning to the state of mind of the publisher's employees who did have responsibility for the editorial, the courts below correctly and necessarily concluded that the evidence at trial, plainly and as a matter of law irrespective of the test on motion for judgment n.o.v. or on appeal, did not establish that the editors responsible for publication did so with "actual malice." It is uncontested that the responsible editors knew and had confidence in the reporter and his work, and had information from the reporter, from an observation of his objective physical condition and medical treatment, from an examination of his damaged camera, from a photographer employed by the newspaper, from another reporter employed by the newspaper who wrote the factual account of the arrest, from telephone callers—all supporting the facts as stated in the editorial. It is also uncontested that neither the plaintiff nor anyone else at the Joplin Police Department had called to claim error in the factual account published two days before the editorial. In no way could that record support a finding by a reasonable jury, by a preponderance of the evidence let alone "with convincing clarity," that the editorial was published with "actual malice." *St. Amant v. Thompson*, 390 U.S. 727 (1968).[3]

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3 The decisions below are consistent with state court cases with similar facts. *See, e.g., Dupler v. Mansfield Journal Co., Inc.*, 64 Ohio St. 2d 116, 413 N.E.2d 1187, 1193 (1980), *cert. denied*, 452 U.S. 962 (1981) (in action on editorial the facts of which were derived from two previously published news stories, court upheld lower court's reversal of a jury verdict for the plaintiff because author of editorial "had no reason to doubt the accuracy of the statutory interpretations attributed to police in the initial article, nor the accuracy of the article itself"); *Lane v. Arkansas Valley Publishing*, 675 P.2d 747, 752 (Colo. Ct. App. 1983), *cert. denied*, 467 U.S. 1252 (1984) ("[T]o the extent that the comments [in the editorials] allude to a factual basis, because defendants demonstrated that these facts had been the subject of news articles and [the plaintiff] submitted no evidence to the contrary, [the plaintiff] did not sustain his burden of making a prima facie showing that defendants published defamatory falsehoods with reckless disregard"); *Bandelin v. Pietsch*, 98 Idaho 337, 563 P.2d 395, 400, *cert. denied*, 434 U.S. 891 (1977) (no actual malice demonstrated by repetition in good faith of false statements from earlier articles in later ones).

II.

The Courts Below Correctly Followed Principles Established By This Court And Searched The Record For Evidence of Actual Malice.

This Court has explicitly defined the role of judges in libel actions:

> The question whether the evidence in the record in a defamation case is of the convincing clarity required to strip the utterance of First Amendment protection is not merely a question for the trier of fact. Judges, as expositors of the Constitution, must independently decide whether the evidence in the record is sufficient to cross the constitutional threshold that bars the entry of any judgment that is not supported by clear and convincing proof of "actual malice."

Bose Corp. v. Consumers Union of U.S., Inc., 466 U.S. 485, 511 (1984).

This Court has held that the "convincing clarity" standard is relevant at all stages of a defamation action by a public official, including judgment n.o.v., *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, ___, 106 S. Ct. 2505, 2513 (1986), and on appeal. *Bose v. Consumers Union of U.S., Inc.*, 466 U.S. at 514. The courts below correctly applied this constitutional rule and found that the plaintiff did not prove "actual malice" by clear and convincing evidence.

Petitioner claims that the application of *Bose* by the courts below deprived him of his Seventh Amendment right to a jury trial. (Petition at 7.) This claim confuses what the court below did: "Our obligation is independently to judge whether Speer has established by clear and convincing evidence that the *Globe*'s editorial is not entitled to First Amendment protection in this case." Opinion, Petition at A3. As the court below stated, and as this Court has held, the ultimate issue in a libel case that courts always must examine—whether the speech that

forms the basis of the suit is protected—is a question of law. The court below fulfilled its obligation in a public-official libel case to review all the evidence to make certain that constitutional principles were constitutionally applied. *See New York Times Co. v. Sullivan*, 376 U.S. 254, 285 (1964). Deciding that question of law does nothing to usurp the function of the jury or to deny petitioner his Seventh Amendment rights.

Petitioner's complaint that his Seventh Amendment rights were violated actually appears to boil down to an argument that the jury might have believed that the *Globe* editors acted with reckless disregard for truth or falsity in not doubting their reporter, McCoy. At the trial, however, petitioner presented no evidence suggesting that the editors had any reason for doubting the reporter's credibility. The courts below did not have to judge the credibility of any witness, therefore, but simply considered petitioner's failure to meet even the most lenient burden of proof, let alone the clear and convincing standard applicable in this public-figure libel action.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Dated: February 27, 1988

Respectfully submitted,

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Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

REPLY BRIEF OF PETITIONER

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REPLY BRIEF OF PETITIONER

REASONS FOR GRANTING THE WRIT

I. The District Court and Court of Appeals Improperly Weighed the Evidence in Deciding the Propriety of Judgment Notwithstanding the Verdict.

In Point I of his Petition for Writ of Certiorari, Petitioner argued that the district court and the Court of Appeals erred by relying on evidence adduced by *Respondent* in determining that Petitioner failed to make a submissible case of actual malice. Petitioner argued that reliance on Respondent's evidence invaded the province of the jury since the jury was free to disregard the testimony of any witness called by Respondent, even if it was wholly un-

contradicted, *The Conqueror,* 166 U.S. 110, 131 (1897). For that reason, Petitioner argued, the action of the lower courts disregarded the fundamental rule, mandated by the Seventh Amendment, that in passing on the sufficiency of the evidence to submit an issue to the jury, courts may look *only* to the evidence supporting the party against whom a motion for directed verdict is filed, *Wilkerson v. McCarthy,* 336 U.S. 53, 57 (1949), and must consider such evidence "in its strongest light in favor of the party against whom the motion . . . was made . . . ." *Continental Ore Co. v. Union Carbide & Carbon Corp.,* 370 U.S. 690, 696 n. 6 (1962).[1]

In Point II of its Brief in Opposition Respondent tacitly concedes much of this argument.[2] Thus, it does not deny that the Seventh Amendment ordinarily prohibits federal courts from weighing evidence in ruling on a motion for judgment notwithstanding the verdict. Nor does it deny that in the case at bar the lower courts weighed the evidence when they found the nonexistence of malice based on, for example, testimony by one of Respondent's editors that two independent witnesses to the incident called him and verified McCoy's story. Rather than denying any of these things, Respondent makes two points on the issue raised in Point I of the Petition.

First, it recites the familiar principle articulated in *New York Times Co. v. Sullivan,* 376 U.S. 254, 285 (1964), and *Bose Corp. v. Consumers Union of U.S., Inc.,* 466 U.S.

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1. The standards for deciding a motion for directed verdict and a motion for judgment notwithstanding the verdict are the same, 9 C. Wright & A. Miller, *Federal Practice and Procedure,* §2537, at 599 (1971).

2. For some reason Respondent addresses Petitioner's arguments in reverse order. Hence, Point II of its Brief responds to Point I of the Petition for Certiorari.

485, 511 (1984), that federal courts must make an independent examination of the whole record in determining whether actual malice is present in a libel case. Unfortunately, Respondent is content to stop at that point. It never addresses the next logical question: Does that mean that in libel cases federal courts may make their own credibility determinations and are not required to view the evidence in the light most favorable to the plaintiff in deciding whether to grant judgment n.o.v.? Although Respondent argued in the lower courts that traditional rules about weighing evidence do not apply to libel cases, its silence on that crucial point in this Court is deafening.

Respondent's second point is that even if the lower courts had declined to weigh evidence, Petitioner still failed to make a submissible case on the issue of malice because he "presented no evidence suggesting that the editors had any reason for doubting the reporter's credibility." (Brief in Opposition at 11.)

Petitioner will not recite all of the evidence which supported his claim of malice; one clear fact controversy demonstrates the absurdity of Respondent's argument. At trial Petitioner called Hazel Bearden as a witness. Ms. Bearden was one of the persons participating in the demonstration in front of the bar. On April 25, 1983, the day before the editorial at issue was published, Ms. Bearden called the *Globe* to complain about an article published on April 24 which recited McCoy's version of what happened. If the evidence is viewed in the light most favorable to Petitioner, giving him the benefit of all legitimate inferences, the jury could find that Ms. Bearden talked to Tom Murray, Managing Editor of the *Globe*, and told him that McCoy's version of what happened was "a pack of lies." Mr. Murray denied ever talking to Ms. Bearden.

The Eighth Circuit discounts Ms. Bearden's testimony by noting that "at least two eyewitnesses had corroborated McCoy's version." 824 F.2d, at 478. Of course the only evidence that two eyewitnesses had corroborated McCoy's story came from Murray, the man to whom the eyewitnesses allegedly made the statement.[3] (Neither independent witness testified at trial.) This evidence came in during *Respondent's* case.

If the jury disbelieved Murray's testimony about what independent eyewitnesses allegedly told him and his denial that he talked to Ms. Bearden, then her testimony stands undisputed. The devastating effect of that testimony is best measured by Murray's concession that if the conversation with Bearden had occurred, it would have caused him to stop publication of the editorial, at least until further investigation could have been made into McCoy's fantasy. If the jury believed Ms. Bearden and disbelieved Murray's testimony that he never talked to Ms. Bearden, then it had every reason to find that the *Globe* "entertained serious doubts as to the truth" of the editorial, *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968).

Respondent's assertion that the lower courts did not have to weigh evidence in order to conclude that Petitioner failed to make a submissible case is further belied by the heavy reliance by both the district court and the Court of Appeals on evidence developed in Respondent's case. Unfortunately, the lower courts in this case are not alone in believing that credibility determinations in libel cases are not the exclusive province of the jury, *see e.g., Warner v. Kansas City Star Co.*, 726 S.W.2d 384, 390 (Mo.App. 1987).

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3. This evidence was admitted over Petitioner's hearsay objection to show its effect on Murray's state of mind.

The instant case provides an excellent vehicle for determining the continuing vitality of the Seventh Amendment in libel cases.

II. The District Court and Court of Appeals' Opinions Improperly Applied Rules of Respondeat Superior in This Case by Failing to Impute the Knowledge of Respondent's Employer to Respondent.

Point I of Respondent's Brief in Opposition boils down to an argument that McCoy did not have "responsibility for the publication" of the defamatory matter in the editorial, *New York Times, supra,* 376 U.S., at 287. Stripped of its verbiage, this amounts to a claim that if a person does not write something or have responsibility for deciding whether to print it, he is not responsible for its publication.

Respondent's argument overlooks entirely what is meant by the term "publication" in defamation law. In *Laun v. Union Electric Co. of Missouri,* 350 Mo. 572, 166 S.W.2d 1065, 1070, 144 A.L.R. 622 (1943), the court held that the term "publication" includes a great deal more than simply disseminating information:

> The fundamental basis of the law of defamation is that one is liable for an unprivileged communication or publication of false and defamatory matter which injures the reputation of another. [Citations omitted.] The *actual publisher* (meaning "any act whereby the defamatory matter is intentionally or negligently communicated to a third person" [citation omitted]) is not alone legally responsible for the defamatory publication but "all who in anywise aid or are concerned in the production of the writing are liable as pub-

> lishers; *the publication of the writing is the act of all concerned in the production of the writing.* Thus, if one composes and dictates, a second writes, and a third publishes, all are liable as publishers, and each is liable as a publisher." [Citations omitted.] Liability attaches to one who requests, *aids, or procures* another to publish the defamatory matter, "the procurer is guilty of a publication whenever it takes place."

(Emphasis added.) Hence, the law denominates all who in anywise aid the production of the writing as "publishers", *Buckley v. Knapp*, 48 Mo. 152, 159 (1871). A request to publish defamatory matter need not be express; it may be inferred from conduct, such as making a statement to a reporter for a newspaper with the knowledge that it is sure to be published, W.B. Odgers, *A Digest of the Law of Libel and Slander* at 155 (1881).

Under these standards McCoy was a person "legally responsible for the defamatory publication," *Laun, supra*, 166 S.W.2d, at 1070. It was uncontroverted that McCoy both obtained the information used in the editorial and disseminated it to his superiors while acting in the scope and course of his employment.[4] So far as the law of libel is concerned, McCoy's knowledge of the falsity of the allegation that Petitioner kicked and beat him while

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4. The fact that McCoy was intimately involved in the process whereby the *Globe* obtained the information used in the editorial distinguishes this case from *New York Times*. As Respondent correctly notes, the *Times* was absolved from liability by this Court even though some of its employees knew of the falsity of the facts appearing in the defamatory advertisement. However, unlike the case at bar, there was no indication in *New York Times* that any of the employees possessing such knowledge had anything to do with publication of the advertisement.

he was handcuffed and defenseless—which knowledge Respondent does not deny in this Court—is the knowledge of a person having responsibility for the publication of the editorial.

The contrary holding of the lower courts warrants certiorari. It can hardly be gainsaid that modern newspapers are journalistic bureaucracies. Like other kinds of corporations they have divisions of labor, and not everyone who contributes to a story actually shares in its writing. Thus, it is not unusual for a number of employees to contribute information used in composing an article written by someone else, *see e.g., Sharon v. Time, Inc.,* 599 F.Supp. 538 (S.D.N.Y. 1984). To permit newspaper corporations to escape liability by compartmentalizing who knows what will not further the ends sought to be achieved by this Court in *New York Times.*

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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